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HOUSE BILL 78

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Luciano "Lucky" Varela

AN ACT

RELATING TO TAXATION; CLASSIFYING FLAVORED MALT BEVERAGES AS SPIRITUOUS LIQUOR; REQUIRING REPORTING OF SALES OF FLAVORED MALT BEVERAGES; ALLOCATING THE REVENUE FROM TAXES PAID ON FLAVORED MALT BEVERAGES TO UNDERAGE DRINKING PREVENTION PROGRAMS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. A new section of the Tax Administration Act is enacted to read:

"[NEW MATERIAL] DISTRIBUTION--LIQUOR EXCISE TAX REVENUE FROM FLAVORED MALT BEVERAGES.--A distribution pursuant to Section 7-1-6.1 NMSA 1978 shall be made to the department of health for the office of substance abuse prevention in an amount equal to the net receipts attributable to the liquor excise tax revenue from flavored malt beverages to further

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1 distribute to counties to fund underage drinking prevention
2 programs pursuant to Subsection C of Section 7-17-12 NMSA
3 1978."

4 Section 2. Section 7-17-2 NMSA 1978 (being Laws 1966,
5 Chapter 49, Section 2, as amended) is amended to read:

6 "7-17-2. DEFINITIONS.--As used in the Liquor Excise Tax
7 Act:

8 A. "alcoholic beverages" means distilled or
9 rectified spirits, potable alcohol, brandy, whiskey, rum, gin,
10 aromatic bitters or any similar beverage, including blended or
11 fermented beverages, dilutions or mixtures of one or more of
12 the foregoing containing more than one-half of one percent
13 alcohol by volume, but "alcoholic beverages" does not include
14 medicinal bitters;

15 B. "beer" means an alcoholic beverage obtained by
16 the fermentation of any infusion or decoction of barley, malt
17 and hops or other cereals in water and includes porter, beer,
18 ale and stout;

19 C. "cider" means an alcoholic beverage made from
20 the normal alcoholic fermentation of the juice of sound, ripe
21 apples that contains not less than one-half of one percent of
22 alcohol by volume and not more than seven percent of alcohol by
23 volume;

24 D. "department" means the taxation and revenue
25 department, the secretary of taxation and revenue or any

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1 employee of the department exercising authority lawfully
2 delegated to that employee by the secretary;

3 E. "flavored malt beverage" means an alcoholic
4 beverage that is fermented in a manner similar to beer, from
5 which some or all of the fermented alcohol has been removed and
6 replaced with distilled ethyl alcohol, and:

7 (1) that contains at least one-half of one
8 percent alcohol by volume;

9 (2) that is treated by processing, filtration
10 or another method of manufacture that is not generally
11 recognized as a traditional process in the production of beer
12 as described in 27 C.F.R. Section 25.55;

13 (3) to which is added flavor or other
14 ingredients containing alcohol, except for a hop extract;

15 (4) for which the producer is required to file
16 a formula for approval with the United States alcohol and
17 tobacco tax and trade bureau pursuant to 27 C.F.R. Section
18 25.55; and

19 (5) that is not exempt pursuant to Subdivision
20 (f) of 27 C.F.R. Section 25.55;

21 [~~E.~~] F. "fortified wine" means wine containing more
22 than fourteen percent alcohol by volume when bottled or
23 packaged by the manufacturer, but "fortified wine" does not
24 include:

25 (1) wine that is sealed or capped by cork

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1 closure and aged two years or more;

2 (2) wine that contains more than fourteen
3 percent alcohol by volume solely as a result of the natural
4 fermentation process and that has not been produced with the
5 addition of wine spirits, brandy or alcohol; or

6 (3) vermouth and sherry;

7 [~~F.~~] G. "microbrewer" means a person who produces
8 fewer than five thousand barrels of beer in a year;

9 [~~G.~~] H. "person" includes, to the extent permitted
10 by law, a federal, state or other governmental unit or
11 subdivision or an agency, department, institution or
12 instrumentality thereof;

13 [~~H.~~] I. "small winegrower" means a winegrower who
14 produces fewer than nine hundred fifty thousand liters of wine
15 in a year;

16 [~~F.~~] J. "spirituous liquor" means alcoholic
17 beverages, [~~except~~] including flavored malt beverages but
18 excluding fermented beverages such as wine, beer, cider and
19 ale;

20 [~~J.~~] K. "wholesaler" means a person holding a
21 license issued under Section 60-6A-1 NMSA 1978 or a person
22 selling alcoholic beverages that were not purchased from a
23 person holding a license issued under Section 60-6A-1 NMSA
24 1978;

25 [~~K.~~] L. "wine" means an alcoholic beverage other

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1 than cider that is obtained by the fermentation of the natural
2 sugar contained in fruit or other agricultural products, with
3 or without the addition of sugar or other products, and that
4 does not contain more than twenty-one percent alcohol by
5 volume; and

6 ~~[E-]~~ M. "winegrower" means a person licensed
7 pursuant to Section 60-6A-11 NMSA 1978."

8 Section 3. Section 7-17-12 NMSA 1978 (being Laws 1984,
9 Chapter 85, Section 8, as amended) is amended to read:

10 "7-17-12. INTERPRETATION OF ACT--ADMINISTRATION AND
11 ENFORCEMENT OF TAX.--

12 A. The department shall interpret the provisions of
13 the Liquor Excise Tax Act.

14 B. The department shall administer and enforce the
15 collection of the liquor excise tax, and the Tax Administration
16 Act applies to the administration and enforcement of the tax.

17 C. The department shall require that liquor excise
18 tax remitted on the sale of flavored malt beverages be
19 identified separately from liquor excise tax remitted on the
20 sale of all other alcoholic beverages. The tax collected on
21 flavored malt beverages shall be distributed pursuant to the
22 Tax Administration Act to the office of substance abuse
23 prevention of the department of health for purposes of funding
24 existing community-based underage drinking prevention and early
25 intervention programs and for funding new underage drinking

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1 prevention and early intervention programs for underserved
2 areas of the state. The criteria for existing and newly
3 developed underage drinking prevention and early intervention
4 programs shall be based on best practices and evidence-based
5 programs established by the office of substance abuse
6 prevention in New Mexico or the national center for substance
7 abuse prevention."

8 Section 4. Section 60-3A-3 NMSA 1978 (being Laws 1981,
9 Chapter 39, Section 3, as amended) is amended to read:

10 "60-3A-3. DEFINITIONS.--As used in the Liquor Control
11 Act:

12 A. "alcoholic beverages" means distilled or
13 rectified spirits, potable alcohol, brandy, whiskey, rum, gin
14 and aromatic bitters bearing the federal internal revenue strip
15 stamps or any similar alcoholic beverage, including blended or
16 fermented beverages, dilutions or mixtures of one or more of
17 the foregoing containing more than one-half of one percent
18 alcohol, but excluding medicinal bitters;

19 B. "beer" means an alcoholic beverage obtained by
20 the fermentation of any infusion or decoction of barley, malt
21 and hops or other cereals in water, and includes porter, beer,
22 ale and stout;

23 C. "brewer" means a person who owns or operates a
24 business for the manufacture of beer;

25 D. "club" means:

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1 (1) any nonprofit group, including an
2 auxiliary or subsidiary group, organized and operated under the
3 laws of this state, with a membership of not less than fifty
4 members who pay membership dues at the rate of not less than
5 five dollars (\$5.00) per year and who, under the constitution
6 and bylaws of the club, have all voting rights and full
7 membership privileges, and which group is the owner, lessee or
8 occupant of premises used exclusively for club purposes and
9 which group the director finds:

10 (a) is operated solely for recreation,
11 social, patriotic, political, benevolent or athletic purposes;
12 and

13 (b) has been granted an exemption by the
14 United States from the payment of the federal income tax as a
15 club under the provisions of Section 501(a) of the Internal
16 Revenue Code of 1986, as amended, or, if the applicant has not
17 operated as a club for a sufficient time to be eligible for the
18 income tax exemption, it must execute and file with the
19 director a sworn letter of intent declaring that it will, in
20 good faith, apply for ~~[such]~~ an income tax exemption as soon as
21 it is eligible; or

22 (2) an airline passenger membership club
23 operated by an air common carrier that maintains or operates a
24 clubroom at an international airport terminal. For the
25 purposes of this paragraph, "air common carrier" means a person

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1 engaged in regularly scheduled air transportation between fixed
2 termini under a certificate of public convenience and necessity
3 issued by the civil aeronautics board;

4 E. "commission" means the secretary of public
5 safety when the term is used in reference to the enforcement
6 and investigatory provisions of the Liquor Control Act and
7 means the superintendent of regulation and licensing when the
8 term is used in reference to the licensing provisions of the
9 Liquor Control Act;

10 F. "department" means the special investigations
11 division of the department of public safety when the term is
12 used in reference to the enforcement and investigatory
13 provisions of the Liquor Control Act and means the director of
14 the alcohol and gaming division of the regulation and licensing
15 department when the term is used in reference to the licensing
16 provisions of the Liquor Control Act;

17 G. "director" means the director of the special
18 investigations division of the department of public safety
19 when the term is used in reference to the enforcement and
20 investigatory provisions of the Liquor Control Act and means
21 the director of the alcohol and gaming division of the
22 regulation and licensing department when the term is used in
23 reference to the licensing provisions of the Liquor Control
24 Act;

25 H. "dispenser" means a person licensed under the

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1 provisions of the Liquor Control Act selling, offering for sale
2 or having in [~~his~~] the person's possession with the intent to
3 sell alcoholic beverages both by the drink for consumption on
4 the licensed premises and in unbroken packages for consumption
5 and not for resale off the licensed premises;

6 I. "distiller" means a person engaged in
7 manufacturing spirituous liquors;

8 J. "flavored malt beverage" means an alcoholic
9 beverage that is fermented in a manner similar to beer, from
10 which some or all of the fermented alcohol has been removed and
11 replaced with distilled ethyl alcohol, and:

12 (1) that contains at least one-half of one
13 percent alcohol by volume;

14 (2) that is treated by processing, filtration
15 or another method of manufacture that is not generally
16 recognized as a traditional process in the production of beer
17 as described in 27 C.F.R. Section 25.55;

18 (3) to which is added flavor or other
19 ingredients containing alcohol, except for a hop extract;

20 (4) for which the producer is required to file
21 a formula for approval with the United States alcohol and
22 tobacco tax and trade bureau pursuant to 27 C.F.R. Section
23 25.55; and

24 (5) that is not exempt pursuant to Subdivision
25 (f) of 27 C.F.R. Section 25.55;

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1 ~~[J-]~~ K. "golf course" means a tract of land and
2 facilities used for playing golf and other recreational
3 activities that includes tees, fairways, greens, hazards,
4 putting greens, driving ranges, recreational facilities,
5 patios, pro shops, cart paths and public and private roads that
6 are located within the tract of land;

7 ~~[K-]~~ L. "governing body" means the board of county
8 commissioners of a county or the city council or city
9 commissioners of a municipality;

10 ~~[L-]~~ M. "hotel" means an establishment or complex
11 having a resident of New Mexico as a proprietor or manager and
12 where, in consideration of payment, meals and lodging are
13 regularly furnished to the general public. The establishment
14 or complex must maintain for the use of its guests a minimum of
15 twenty-five sleeping rooms;

16 ~~[M-]~~ N. "licensed premises" means the contiguous
17 areas or areas connected by indoor passageways of a structure
18 and the outside dining, recreation and lounge areas of the
19 structure that are under the direct control of the licensee and
20 from which the licensee is authorized to sell, serve or allow
21 the consumption of alcoholic beverages under the provisions of
22 its license; provided that in the case of a restaurant,
23 including a restaurant that has operated continuously in two
24 separate structures since July 1, 1987 and that is located in a
25 local option district that has voted to disapprove the transfer

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1 of liquor licenses into that local option district, hotel, golf
2 course or racetrack, "licensed premises" includes all public
3 and private rooms, facilities and areas in which alcoholic
4 beverages are sold or served in the customary operating
5 procedures of the restaurant, hotel, golf course or racetrack;

6 [N-] O. "local option district" means a county that
7 has voted to approve the sale, serving or public consumption of
8 alcoholic beverages, or [~~any~~] an incorporated municipality that
9 falls within a county that has voted to approve the sale,
10 serving or public consumption of alcoholic beverages, or [~~any~~]
11 an incorporated municipality of over five thousand population
12 that has independently voted to approve the sale, serving or
13 public consumption of alcoholic beverages under the terms of
14 the Liquor Control Act or any former act;

15 [O-] P. "manufacturer" means a distiller,
16 rectifier, brewer or winer;

17 [P-] Q. "minor" means a person under twenty-one
18 years of age;

19 [Q-] R. "package" means an immediate container of
20 alcoholic beverages that is filled or packed by a manufacturer
21 or wine bottler for sale by the manufacturer or wine bottler to
22 wholesalers;

23 [R-] S. "person" means an individual, corporation,
24 firm, partnership, copartnership, association or other legal
25 entity;

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1 [~~S.~~] T. "rectifier" means a person who blends,
2 mixes or distills alcohol with other liquids or substances for
3 the purpose of making an alcoholic beverage for the purpose of
4 sale other than to the consumer by the drink, and includes all
5 bottlers of spirituous liquors;

6 [~~F.~~] U. "restaurant" means an establishment having
7 a New Mexico resident as a proprietor or manager, that is held
8 out to the public as a place where meals are prepared and
9 served primarily for on-premises consumption to the general
10 public in consideration of payment and that has a dining room,
11 a kitchen and the employees necessary for preparing, cooking
12 and serving meals; provided that "restaurant" does not include
13 establishments as defined in rules promulgated by the director
14 serving only hamburgers, sandwiches, salads and other fast
15 foods;

16 [~~U.~~] V. "retailer" means a person licensed under
17 the provisions of the Liquor Control Act selling, offering for
18 sale or having in [~~his~~] the person's possession with the intent
19 to sell alcoholic beverages in unbroken packages for
20 consumption and not for resale off the licensed premises;

21 [~~V.~~] W. "spirituous liquors" means alcoholic
22 beverages as defined in Subsection A of this section, [~~except~~]
23 including flavored malt beverages but excluding fermented
24 beverages such as wine, beer and ale;

25 [~~W.~~] X. "wholesaler" means a person whose place of

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1 business is located in New Mexico and who sells, offers for
2 sale or possesses for the purpose of sale any alcoholic
3 beverages for resale by the purchaser;

4 ~~[X-]~~ Y. "wine" includes the words "fruit juices"
5 and means alcoholic beverages obtained by the fermentation of
6 the natural sugar contained in fruit or other agricultural
7 products, with or without the addition of sugar or other
8 products, that do not contain less than one-half of one percent
9 nor more than twenty-one percent alcohol by volume;

10 ~~[Y-]~~ Z. "wine bottler" means a New Mexico
11 wholesaler who is licensed to sell wine at wholesale for resale
12 only and who buys wine in bulk and bottles it for wholesale
13 resale;

14 ~~[Z-]~~ AA. "winegrower" means a person who owns or
15 operates a business for the manufacture of wine; and

16 ~~[AA-]~~ BB. "winer" means a winegrower."

17 Section 5. A new section of Chapter 60, Article 3A NMSA
18 1978 is enacted to read:

19 "[NEW MATERIAL] AUTHORITY OF DIRECTOR TO CLASSIFY FLAVORED
20 MALT BEVERAGES AS SPIRITUOUS LIQUOR.--

21 A. The director shall, beginning on July 1, 2009,
22 regulate flavored malt beverages as spirituous liquor.

23 B. No later than July 1, 2009, the director shall
24 make available to the public on the internet a list of all
25 flavored malt beverages authorized to be sold in the state as

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1 spirituous liquor.

2 C. The director shall ensure that the list of
3 flavored malt beverages authorized to be sold in the state is
4 updated on the first day of each quarter of the calendar year.

5 D. On and after July 1, 2009, a manufacturer
6 selling alcoholic beverages in the state shall file, under
7 penalty of perjury, a report with the department listing each
8 flavored malt beverage manufactured by the manufacturer that is
9 distributed or sold in the state.

10 E. On or after July 1, 2009, a manufacturer shall
11 not distribute or sell in the state a flavored malt beverage
12 that the manufacturer has not listed in accordance with this
13 section.

14 F. The department may require a manufacturer of a
15 flavored malt beverage to provide the department with a copy of
16 the following filed with the United States alcohol and tobacco
17 tax and trade bureau, pursuant to 27 C.F.R. Section 25.55:

18 (1) a statement of process; or

19 (2) a formula.

20 G. A manufacturer of an alcoholic beverage that the
21 director classifies or proposes to classify as a flavored malt
22 beverage may submit evidence to the department to clarify that
23 the alcoholic beverage is not a flavored malt beverage and may
24 be classified as other than spirituous liquor. To prove that
25 the alcoholic beverage is not a flavored malt beverage, the

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1 manufacturer shall show:

2 (1) that the alcohol in the alcoholic beverage
3 is created by fermentation, infusion or decoction of a malted
4 grain;

5 (2) that the alcoholic beverage is produced by
6 processing, filtration or another method of manufacture that is
7 generally recognized as a traditional process in the production
8 of beer as described in 27 C.F.R. Section 25.55; and

9 (3) that the alcoholic beverage does not
10 contain added flavor or other ingredients containing alcohol,
11 unless the alcohol is added as a hop extract, and:

12 (a) the producer is not required to file
13 a formula for approval with the United States alcohol and
14 tobacco tax and trade bureau pursuant to 27 C.F.R. Section
15 25.55; or

16 (b) the alcoholic beverage is exempt
17 pursuant to Subdivision (f) of 27 C.F.R. Section 25.55.

18 H. The department shall review the evidence
19 submitted by the manufacturer to prove that the alcoholic
20 beverage it manufactures is not a flavored malt beverage, and
21 the director shall issue a finding stating the category in
22 which the alcoholic beverage will be classified.

23 I. The department shall make available to the
24 public on the internet a list of all alcoholic beverages
25 determined by the director to be beer and that are authorized

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pursuant to this section to be sold as beer in New Mexico."

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